Local 825, International Union of Operating Engineers, AFL-CIO *and* Patock Construction Co. and Local 343, Laborers International Union of North America, AFL-CIO. Case 22-CD-361

March 25, 1981

DECISION AND DETERMINATION OF DISPUTE

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by Patock Construction Co., herein called the Employer, alleging that Local 825, International Union of Operating Engineers, AFL-CIO, herein called Operating Engineers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to employees it represents rather than to employees represented by Local 343, Laborers International Union of North America, AFL-CIO, herein called Laborers.

Pursuant to notice, a hearing was held before Hearing Officer Gregory M. Burke on December 12, 1980. Neither the Operating Engineers nor the Laborers appeared at the hearing. The Employer appeared and was afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer filed a brief.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free of prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board make the following findings:

I. THE BUSINESS OF THE EMPLOYER

Undisputed evidence was presented at the hearing and we find that the Employer, Patock Construction Co., a New Jersey corporation with offices in Tinteen Falls, New Jersey, is a general building contractor specializing in commercial and industrial construction throughout central New Jersey. During the past calendar and fiscal years, representative periods, the Employer purchased and received goods valued in excess of $50,000 directly from outside the State of New Jersey. On the basis of the foregoing and the entire record, we find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

We find that the Operating Engineers[1] and the Laborers[2] are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

In 1970, the Employer purchased a backhoe machine which it has since used for excavation, mason tending, cleanup, moving construction materials, and other tasks. Since the purchase of the backhoe, it has been operated exclusively by James Long, an employee represented by the Laborers. Long spends approximately 50 percent of his time operating the backhoe and the remaining time doing general laborer's work such as tending masons, hauling material, and cleaning up trash.

In 1978, the Operating Engineers picketed the Employer and caused it to stop performing backhoe work. The Employer filed charges alleging that the Operating Engineers had violated Section 8(b)(4)(D) of the Act. Subsequently, the Employer and the Operating Engineers entered into a settlement which provided, *inter alia*, that the Operating Engineers would not picket the Employer where an object thereof was to force or require the Employer to assign the operation of the backhoe, bulldozer, or other excavation equipment to employees who are members of the Operating Engineers rather than to employees who are not members.

In 1980, the Employer acquired contracts with the Board of Education of the Freehold Regional High School District to construct additions to four high schools in Monmouth County. On October 16, 1980,[3] the Employer began to use the backhoe at the Freehold High School construction site. The backhoe was used until October 21, when the Operating Engineers began picketing the site.

On October 20, the Employer's superintendent of construction, John Coleman, had a conversation with the Operating Engineers business agent, Keith Allen Jones, at the Freehold High School. Coleman first overheard Jones state during a telephone call that, "We will move the pickets to Freehold." After Jones finished his call, Coleman asked what the problem was. Jones said that Coleman knew what the problems was, that they had been through this before. Coleman said that he thought the prob-

[1] *Local 825-A, B, C, and D, International Union of Operating Engineers (Iacono Construction Company, Inc.)*, 227 NLRB 110 (1976).

[2] We find the Laborers is a labor organization within the meaning of the Act on the basis of the collective-bargaining agreement between the Laborers and Building Contractors Association of New Jersey, admitted into evidence at the hearing, and the terms and provisions of that agreement.

[3] All dates herein refer to 1980 unless otherwise specified.

lems were settled, and Jones responded, "Nope, your boss still wants to play games. If he doesn't mind the harassment, I have the time." Coleman said that he did not think there would be problems on the job because "Bil Jim is doing the entire job." Jones disputed Coleman's claim, asserting that "Muccio" would also be there. (Bil Jim Excavating Company has employees who are represented by the Operating Engineers. Muccio is an excavator whose employees are not represented by the Operating Engineers.) Coleman replied that Muccio would not be there, that, "We definitely have this all wrapped up with Bil Jim." Jones then said, "That is beside the point. You have an operator, a man in the back operating your machine who is not an operator. I was just out there, and while I was there he got off the machine, grabbed the shovel, jumped down into the hole, and started shoveling dirt. What kind of operator is that?" Coleman asked if there was going to be trouble, and Jones replied, "Just as soon as I can get the wording on the signs. Your boss has twelve million dollars worth of work and you don't have a single one of my men on yet, and I will follow him wherever he goes."

From October 21, until approximately October 29, members of the Operating Engineers picketed the construction site with signs stating, "Patock Construction Company does not have a contract with Local 825, A, B, C, D, or our International Union of Operating Engineers."

B. *The Work in Dispute*

The work in dispute involves the operation of the backhoe owned by the Employer.

C. *The Contentions of the Parties*

The Employer contends that the work in dispute should be assigned to the employee represented by the Laborers, that the dispute is properly before the Board, and that such an assignment is consistent with the collective-bargaining agreement, the Employer's preference, customary practice, and efficiency of operations. The Employer also contends that, in view of the likelihood that the same or similar dispute will arise in the future, the award of the backhoe work requires a broad order awarding the assignment of the work to employees represented by the Laborers at all of the Employer's construction sites in Monmouth and Ocean Counties, New Jersey. Neither the Laborers nor the Operating Engineers has taken any position on any issue.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

In order to find reasonable cause to believe that Section 8(b)(4)(D) has been violated, the Board must determine, in this case, whether or not the Operating Engineers threatened, coerced, or restrained the Employer, by picketing or otherwise, with an object of forcing or requiring the Employer to assign the backhoe work to employees represented by the Operating Engineers rather than to the employee who had been assigned by the Employer to operate the backhoe. Although the picket signs stated merely that the Employer did not have a contract with the Operating Engineers, the conversation between Operating Engineers Business Agent Jones and the Employer's superintendent of construction, Coleman, immediately before the picketing began, reveals the Operating Engineers' true purpose in picketing. During this conversation, Jones dismissed as "beside the point" the previous discussion regarding whether or not the Employer was utilizing contractors whose employees were not represented by the Operating Engineers. Jones explained that the problem was that the Employer was currently utilizing a machine operator who not only operated the machine, but also "jumped down into the hole" and started shoveling dirt. This description of the "operator" matches the description of the employee who had been assigned by the Employer to operate the backhoe since that employee not only operated the backhoe, but also engaged in cleanup and other tasks not involving the backhoe. Jones continued his conversation with Coleman by threatening to picket, explaining further that "your boss has twelve million dollars worth of work and you don't have a single one of my men on yet, and I will follow him wherever he goes." The reasonable inference, particularly in the absence of evidence to the contrary, is that Jones sought to have the backhoe work assigned an employee represented by the Operating Engineers, and that Jones would picket the construction sites until the Employer complied with Jones' wishes.

On the basis of the foregoing and the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[4] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[5]

The following factors are relevant in making the determination of the dispute before us:

1. Collective-bargaining agreement

The Employer has a collective-bargaining agreement with the Laborers covering the work in dispute. The Employer is not party to any collective-bargaining agreement with the Operating Engineers. This factor favors an award of the disputed work to employees represented by the Laborers.

2. Employer's assignment and practice

It is undisputed that since 1971 the Employer has assigned the work of the operation of the backhoe to an employee who is represented by the Laborers. The Employer's preference and past practice favor an award of the disputed work to employees represented by the Laborers.

3. Area practice

Employer Representative John Coleman testified without contradiction that the practice of contractors in the area is to assign the operation of backhoes to general laborers. The area practice favors the award of the work to employees represented by the Laborers.

4. Economy and efficiency of operation

Employer representatives testified that the Employer's operation does not require the use of a backhoe on a steady basis. James Long, the employee currently assigned to operate the backhoe, performs other general laborer tasks as well. However, if Long did not operate the backhoe, there would not be sufficient work for him to perform on a full-time basis. Since the Operating Engineers are guaranteed a 40-hour workweek whenever the machine is used, the Employer would be economically disadvantaged if the work were assigned to employees represented by the Operating Engineers. Therefore, economy and efficiency of operation favor the assignment of the disputed work to employees represented by the Laborers.

5. Relative skills

The evidence is uncontradicted that the operation of the backhoe requires no sophisticated training or skills. There are no licensing requirements for the operation of the backhoe. There is insufficient evidence to indicate that the assignment of the work to either group would result in greater safety or that the work would be performed in anything less than a satisfactory manner. Thus, this factor favors neither group.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees who are represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement, the Employer's assignment and practice, area practice, and economy and efficiency of operation. In making this determination, we are awarding the work in question to employees who are represented by Laborers, but not to that Union or its members.

The Board has previously held that it will restrict the scope of its determination to a specific jobsite unless there is evidence that similar disputes may occur in the future.[6] The Employer herein submits that there is strong probability that similar disputes involving the Operating Engineers may occur in the future.

The Employer is engaged in construction operations utilizing the backhoe in Monmouth and Ocean Counties, New Jersey. Current construction work is projected to continue into late 1981. In addition, the Employer contends that since it has been involved in construction work in these two counties since 1946 it is reasonable to assume that it will acquire additional work requiring the use of the backhoe in Ocean and Monmouth Counties. On the basis of the foregoing and Operating Engineers Business Agent Jones' statement, prior to establishment of the picket line, that the Operating Engineers would follow the Employer "wherever he goes," we find that there is a reasonable likelihood that this dispute will recur. Therefore, our determination in this case applies to similar disputes involving the Employer's use of the backhoe in its operations in Monmouth and Ocean Counties, New Jersey.

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[4] *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO [Columbia Broadcasting System]*, 364 U.S. 573 (1961).

[5] *International Association of Machinists, Lodge No. 1743, AFL-CIO (J. A. Jones Construction Company)*, 135 NLRB 1402 (1962).

[6] See, e.g., *International Longshoremen's Association, Local 1576, AFL-CIO and International Longshoremen's Association, Local 329, AFL-CIO (Texas Contracting Company)*, 162 NLRB 878, 884 (1967).

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees who are represented by Local 343, Laborers International Union of North America, AFL–CIO, are entitled to perform the work of the operation of the backhoe owned by Patock Construction Co. at all of Patock Construction Co.'s construction sites in Monmouth and Ocean Counties, New Jersey.

2. Local 825, International Union of Operating Engineers, AFL–CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Patock Construction Co. to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 825, International Union of Operating Engineers, AFL–CIO, shall notify the Regional Director for Region 22, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.